Faekah bt Hj Husin & Ors v Menteri Besar Selangor (Pemerbadanan)

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-31–04 OF 2019(B)
ROHANA YUSUF PCA, AZAHAR MOHAMED CJ (MALAYA), ZAWAWI SALLEH, VERNON ONG AND ZABARIAH MOHD FCJJ
19 APRIL 2021

Companies and Corporations — Corporation sole ('corporation') — Definition and characteristics — Menteri Besar Selangor (Incorporation) Enactment 1994 ('Enactment') — Whether Enactment did not provide for corporation to have board of directors ('BOD') or how it was to be managed or operated — Whether under the Enactment Menteri Besar of Selangor ('MB') as the corporation had absolute power to make decisions without having to consult or seek approval of any other party — Whether MB's decision as corporation to approve voluntary separation scheme payments to staff of the corporation on the premature termination of their employment contracts without obtaining prior approval of an administratively-created BOD within the corporation was lawful — Whether the said BOD was an informal one which had no legal status or powers or legal authority and could not fetter the powers of the MB as a corporation sole

The respondent was a corporation sole incorporated under the Menteri Besar Selangor (Incorporation) Enactment 1994 ('the MBI Enactment'). All the appellants were its former employees under respective contracts of employment. The first and second appellants were, respectively, the respondent's Chief Executive Officer and Chief Operating Officer. Before he resigned as Menteri Besar of Selangor ('MB') in 2014, Tan Sri Abdul Khalid Ibrahim ('TSKI') in his capacity as the respondent had approved payment of RM2,713,590 to the appellants under a voluntary separation scheme ('VSS'). The VSS payments were received by the appellants. The respondent subsequently sued the appellants in the High Court for the refund of the VSS payments on the ground that the payments were made unlawfully since TSKI failed to obtain the approval of the respondent's board of directors ('BOD') with respect to the same. The respondent contended that at the material time the BOD was comprised of the MB, the State Secretary and the State Financial Officer. The respondent also alleged that the first and second appellants conspired to injure the respondent by collaborating with TSKI on the formula for the VSS payments and they had thereby breached their fiduciary duties to the respondent. In their defence, the appellants said the VSS payments were lawfully approved because TSKI had the authority to approve them under s 4 of the MBI Enactment in his capacity as the corporation sole without having to obtain any other party's approval. The trial court agreed with the appellants and

dismissed the respondent's claim. Inter alia, the trial court found that there was no provision for a BOD in the MBI Enactment and that TSKI had the power to approve the VSS payments on his own. The court also found no evidence to support the allegation of conspiracy to injure against the first and second appellants. The Court of Appeal ('COA') reversed the decision on appeal and held that: (a) the VSS payments were unlawful since the BOD, which in fact existed in the respondent, had not approved it; (b) past records showed that, with the exception of the VSS payments, the decisions of the respondent were always made with the approval of the BOD; and (c) good corporate governance, accountability and transparency required TSKI to have obtained the BOD's approval to the VSS payments. In the instant appeal against the COA's decision, the questions of law for determination were: (i) whether the respondent was a corporation sole or a corporation aggregate; (ii) if it was a corporation sole, whether the MB at the material time had power to enter into contracts in the name of and on behalf of the respondent in his sole discretion; (iii) whether the BOD in the respondent could fetter the MB's powers at the material time; and (iv) whether employees of the respondent under the instructions of the MB at the material time were liable for breach of trust and/or breach of fiduciary duty to the respondent.

Held, unanimously allowing the appeal, setting aside the COA's decision and reinstating the decision of the High Court:

(1) The respondent was, in law, a corporation sole established under the MBI Enactment and was not a corporation aggregate. This was not only the finding of the courts below but also a fact undisputed by the respondent. One could not at the same time be both a corporation sole and a corporation aggregate. As such, the Court of Appeal erred when it accepted the respondent as a corporation sole, yet imposed the requirement of accountability as in a corporation aggregate (see paras 18–19 & 36).

(2) The line of argument adopted by the respondent — that although it was a corporation sole, the approval of its BOD was required for the VSS payments — defied the definition and characteristic of a corporation sole which was a body politic constituted of only one member which existed in perpetuity and could sue and be sued. To suggest that a corporation sole was legally bound to account to a BOD did not accord with its characteristic and definition (see paras 38–40).

(3) There was no requirement in the MBI Enactment, or in any other law for that matter, that the respondent was to be governed by a BOD. Hence, the failure to comply with or obtain the sanction of a BOD that existed within the respondent did not result in a decision that breached any law or statute so as to render that decision unlawful. TSKI's approval without the sanction of the administratively-constituted BOD did not breach the

MBI Enactment and did not amount to an unlawful decision resulting in the VSS payments being unlawful. The BOD's decision directing the management to revert on the proposed VSS payments, as appeared in the minutes of meeting of the BOD, was not binding on TSKI (see paras 45–46).

(4) The court had to give effect to the intent and object of the legislature. Since there was no provision establishing a BOD or conferring power to such a body in the MBI Enactment, it was not for the court to supplant what the law never legislated or intended to legislate. The MBI Enactment did not contain any provision on how it was to be managed or operated. The BOD that undeniably existed in the respondent was merely an informal administrative body without any statutory power or duties or legal authority. Thus, TSKI in exercising his powers under the MBI Enactment to approve the VSS payments did not need to consult and obtain the BOD's approval. If the Selangor State Legislature had intended to make it mandatory for the respondent to be governed by a BOD or an advisory committee, that would have been expressly stated in the MBI Enactment (see paras 42, 52–53 & 59).

(5) The facts showed that the first and second respondents had acted under the instructions of TSKI as MB and they were not the ones who orchestrated the VSS payments. There was no evidence to support the allegation of conspiracy against them, nor was there any evidence to link the other respondents to the alleged conspiracy. The respondent had failed to establish how the respondents were in breach of trust or in breach of fiduciary duties. The appellants had received the payments purely as VSS payments upon the premature termination of their employment with the respondent and there was nothing sinister about the payments (see paras 66–67).

(6) The Court of Appeal's finding that, with the exception of the VSS payments, the approvals of the BOD had always been obtained was a finding that was not entirely substantiated by the evidence. The COA failed to consider TSKI's own evidence that he had not always obtained the BOD's approval when he exercised his function as the respondent. TSKI had also testified that he was not bound by the BOD's decision and that, to him, the BOD was merely advisory and existed to keep the state government informed of the decisions made by the respondent (see paras 43–44).

[Bahasa Malaysia summary

Responden merupkan perbadanan tunggal yang diperbadankan di bawah Enakmen (Perbadanan) Menteri Besar Selangor 1994 ('Enakmen MBI'). Kesemua perayu merupakan mantan pekerjanya di bawah kontrak pekerjaan masing-masing. Perayu-perayu pertama dan kedua adalah, masing-masingnya,

Ketua Pegawai Eksekutif responden dan Ketua Pegawai Operasi. Sebelum beliau meletak jawatan sebagai Menteri Besar Selangor ('MB') pada 2014, Tan Sri Abdul Khalid Ibrahim ('TSKI') dalam kapasitinya sebagai responden telah meluluskan pembayaran RM2,713,590 kepada perayu-perayu di bawah skim pengasingan sukarela ('VSS'). Pembayaran VSS itu telah diterima oleh perayu-perayu. Responden kemudian telah menyaman perayu-perayu di Mahkamah Tinggi untuk bayaran balik pembayaran VSS tersebut atas alasan pembayaran tersebut telah dibuat secara tidak sah oleh kerana TSKI telah gagal untuk memperoleh kelulusan Lembaga Pengarah responden ('LP') berkaitan perkara tersebut. Responden menegaskan bahawa pada masa matan LP terdiri daripada MB, Setiausaha Negeri dan Pegawai Kewangan Negeri. Responden juga mengatakan bahawa perayu-perayu pertama dan kedua berkonspirasi untuk menjejaskan responden dengan bekerjasama dengan TSKI berhubung formula untuk pembayaran VSS tersebut dan mereka telah dengan itu melanggar kewajipan fidusiari mereka terhadap responden. Dalam pembelaan mereka, perayu-perayu mengatakan pembayaran VSS tersebut telah diluluskan dengan sah kerana TSKI mempunyai kuasa untuk meluluskannya di bawah s 4 Enakmen MBI dalam kapasitinya sebagai perbadanan tunggal tanpa perlu memperoleh kelulusan mana-mana pihak lain. Mahkamah perbicaraan bersetuju dengan perayu-perayu dan menolak tututan responden. Antara lain, mahkamah perbicaraan mendapati bahawa tiada peruntukan untuk suatu LP dalam Enakmen MBI dan bahawa TSKI mempunyai kuasa untuk meluluskan pembayaran VSS tersebut dengan sendirinya. Mahkamah juga mendapati tiada keterangan untuk menyokong dakwaan konspirasi untuk menjejaskan terhadap perayu-perayu pertama dan kedua. Mahkamah Rayuan ('MR') telah mengakas keputusan semasa rayuan dan memutuskan bahawa: (a) pembayaran VSS tersebut menyalahi undang-undang kerana LP itu, yang pada hakikatnya wujud pada responden, tidak meluluskannya; (b) rekod lama menunjukkan bahawa, dengan pengecualian berhubung pembayaran VSS tersebut, keputusan-keputusan responden sentiasa dibuat dengan kelulusan LP; (c) tadbir urus korporat yang baik, akauntabiliti dan ketelusan memerlukan TSKI untuk mendapatkan kelulusan LP untuk pembayaran VSS tersebut. Dalam rayuan-rayuan ini terhadap keputusan MR, persoalan undang-undang untuk ditentukan adalah: (i) sama ada responden adalah perbadanan tunggal atau perbadanan agregat; (ii) jika ia adalah perbadanan tunggal, sama ada MB pada masa matan mempunyai kuasa untuk membuat kontrak atas nama dan bagi pihak responden mengikut budi bicara mutlaknya; (iii) sama ada LP dalam responden dapat mengambil alih kuasa MB pada masa matan; dan (iv) sama ada pekerja responden di bawah arahan MB pada masa matan bertanggungjawab kerana pecah amanah dan/atau melanggar kewajipan fidusiari kepada responden.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan keputusan MR dan mengembalikan semula keputusan Mahkamah Tinggi:

(1) Responden adalah, dari segi undang-undang, perbadanan tunggal yang ditubuhkan di bawah Enakmen MBI dan bukan perbadanan agregat. Ini bukan hanya dapatan mahkamah bawahan tetapi juga fakta yang tidak dipertikaikan oleh responden. Seseorang tidak boleh pada masa sama menjadi perbadanan tunggal dan perbadanan agregat. Oleh itu, Mahkamah Rayuan terkhilaf apabila ia menerima responden sebagai perbadanan tunggal, malah meletakkan keperluan akauntabiliti sepertimana dalam suatu perbadanan agregat (lihat perenggan 18–19 & 36).

(2) Hujah yang diguna pakai oleh responden — bahawa walaupun ia adalah perbadanan tunggal, kelulusan LPnya diperlukan untuk pembayaran VSS — menentang definisi dan ciri-ciri perbadanan tunggal yang merupakan badan politik terbentuk dengan hanya seorang anggota yang wujud selamanya dan boleh menyaman dan disaman. Dengan mencadangkan bahawa perbadanan tunggal terikat dari segi undang-undang kepada LP tidak menepati ciri-ciri dan definisinya (lihat perenggan 38–40).

(3) Tiada keperluan dalam Enakmen MBI, atau dalam mana-mana undang-undang lain untuk perkara tersebut, bahawa responden hendaklah dikawal oleh LP. Justeru, kegagalan untuk mematuhi dengan atau memperoleh sanksi LP yang wujud dalam responden tidak mengakibatkan suatu keputusan yang melanggar mana-mana undang-undang atau statut sehingga menjadikan keputusan itu tidak sah. Kelulusan TSKI tanpa sanksi LP yang dibentuk secara pentadbiran itu tidak melanggar Enakmen MBI dan tidak menjadikan keputusan itu menyalahi undang-undang sehingga mengakibatkan pembayaran VSS tersebut tidak sah. Keputusan LP mengarahkan pengurusan kembali kepada pembayaran VSS tersebut, sepertimana dinyatakan dalam minit mesyuarat LP, adalah tidak mengikat TSKI (lihat perenggan 45–46).

(4) Mahkamah perlu memberi kesan kepada niat dan tujuan badan perundangan. Oleh kerana tiada peruntukan yang menubuhkan LP atau memberi kuasa kepada suatu badan sedemikian dalam Enakmen MBI, ia bukan untuk mahkamah menggantikan apa-apa undang-undang yang tidak pernah digubal atau bertujuan untuk membuat perundangan. Enakmen MBI tidak mengandungi apa-apa peruntukan tentang bagaimana ia patut dikendalikan atau beroperasi. LP yang tidak dinafikan wujud dalam responden hanya badan pentadbiran tidak rasmi tanpa apa-apa kuasa statutori atau kewajipan atau kuasa perundangan. Oleh itu, TSKI dalam melaksanakan kuasanya di bawah Enakmen MBI untuk meluluskan pembayaran VSS tidak perlu berunding dan memperoleh kelulusan LP. Jika Badan Perundangan Negeri Selangor bertujuan untuk menjadikannya mandaotir untuk responden dikawal oleh suatu LP atau jawatankuasa penasihat, ianya patut telah dinyatakan

dengan jelas dalam Enakmen MBI (lihat perenggan 42, 52–53 & 59). A

(5) Fakta menunjukkan bahawa responden-responden pertama dan kedua telah bertindak di bawah arahan TSKI sebagai MB dan mereka bukanlah orang yang mengendalikan pembayaran VSS tersebut. Tiada keterangan untuk menyokong dakwaan konspirasi terhadap mereka, mahu pun terdapat apa-apa keterangan untuk mengaitkan responden lain dengan dakwaan konspirasi itu. Responden telah gagal untuk membuktikan bagaimana responden-responden telah pecah amanah atau melanggar kewajipan fidusiari. Perayu-peryau telah menerima bayaran semata-mata sebagai pembayaran VSS semasa penamatan pramatang pekerjaan mereka dengan responden dan tiada apa-apa yang bersifat jahat mengenai bayaran tersebut (lihat perenggan 66–67). B C

(6) Dapatan Mahkamah Rayuan bahawa, dengan pengecualian pembayaran VSS, kelulusan LP sentiasan telah diperolah adalah suatu dapatan yang tidak sepenuhnya dibuktikan dengan keterangan. MR gagal mempertimbangkan keterangan TSKI sendiri bahawa beliau tidak selalu memperoleh kelulusan LP semasa beliau melaksanakan fungsinya sebagai responden. TSKI juga telah memberi keterangan bahawa beliau tidak terikat dengan keputusan LP dan bahawa, baginya, LP hanya sekadar nasihat dan wujud untuk memastikan kerajaan negeri dimaklumkan mengenai keputusan yang dibuat oleh responden (lihat perenggan 43–44).] D E

Cases referred to

Archbishop of Perth v 'AA' to 'JC' Inclusive; 'DJ' and Ors v Trustees of Christian Brothers and Ors BC9501687, SC (refd) F

Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor [2020] 2 MLJ 1, FC (refd)

Badan Peguam Malaysia v Louis Edward Van Buerle [2006] 1 MLJ 21, CA (refd) G

Crouch v Commissioner for Railways (Qld) and another (1985) 62 ALR 1, HC (refd)

Daimler Company, Limited v Continental Tyre and Rubber Company (Great Britain) Limited [1916] 2 AC 307, HL (refd) H

Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Ors [1998] 5 MLJ 129, HC (distd)

Hubbard Association of Scientologists International v Attorney-General (Vic) [1976] VR 119 (refd)

Kuala Lumpur, Klang & Port Swettenham Omnibus Co Bhd v Transport Workers' Union [1971] 1 MLJ 102, FC (refd) I

Overseers of Poor v Sears 39 Mass 122, SC (refd)

Putrajaya Holdings Sdn Bhd v Digital Green Sdn Bhd [2008] 7 MLJ 757, HC (refd)

A *Roman Catholic Church of the Archdiocese of Santa Fe, In re* 2020 Bankr LEXIS 3511 (refd)
S Govinda Menon v The Union of India & Anor 1967 AIR 1274; LNIND [1967] SC 33, SC (refd)
Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor [2007] 6 MLJ 581, FC (refd)
B *State of Johor and another v Tunku Alam Shah ibni Tunku Abdul Rahman and others* [2005] 4 SLR 380; [2005] SGHC 156, HC (refd)
Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased) [2020] 4 MLJ 721, FC (refd)
C *The Board of Trustees, Ayurvedic Andunani Tibia College, Delhi vs The State of Delhi And Anor* 1962 AIR 458; LNIND [1961] SC 337, SC (refd)
Vengadasalam v Khor Soon Weng & Ors [1985] 2 MLJ 449, SC (refd)
D *Vickers, Sons and Maxim, Limited v Evans* [1910] AC 444, HL (refd)

Legislation referred to

Chief Minister Malacca (Incorporation) Enactment 1993 s 9
Companies Act 2016 s 211
E Incorporation (State Legislatures Competency) Act 1962
Kelantan Menteri Besar Enactment 1950
Menteri Besar Selangor (Incorporation) Enactment 1994 ss 3, 4, 5
Minister of Finance (Incorporation) Act 1957 s 3

F **Appeal from:** Civil Appeal No B-02(NCVC)(W)-907–05 of 2017 (Court of Appeal, Putrajaya)

Edmund Bon Tai Soon (New Sin Yew and Hoe Sue Lu with him) (Amerbon) for the appellants.
G *Gopal Sri Ram (How Li Nee, Masturina Mohamad Rodzi and Marcus Lee with him) (Edwin Lim & Suren) for the respondent.*

Rohana Yusuf PCA (delivering judgment of the court):

H **[1]** The appellants, who were defendants in the High Court are appealing against the decision of the Court of Appeal by posing four legal questions before us.

[2] The appeal before us relates to the issue involving a body incorporated
I under Menteri Besar Selangor (Incorporation) Enactment 1994 ('the MBI Enactment').

[3] In this judgment, parties will be referred to, as they were, in the High Court.

[4] The plaintiff is a body incorporated under the MBI Enactment and is known as Menteri Besar Selangor (Pemerbadanan). The defendants were former employees of the plaintiff. The first defendant, Faekah bt Hj Hassan was employed as the chief executive officer ('CEO'), the second defendant, Rohany bt Dato' Talib was holding the position as the chief operating officer ('COO') and the third to eight defendants were all officers holding various positions in the plaintiff. They were all employed under their respective contracts of employment.

[5] The then Menteri Besar of Selangor, Tan Sri Dato' Seri Abdul Khalid bin Ibrahim ('TSKI') as a Menteri Besar (Pemerbadanan) had approved payment in the sum of RM2,713,590 to be paid to the defendants under a voluntary separation scheme ('VSS payments'). He did not seek any approval of the plaintiff's Board of Directors ('BOD'). According to the plaintiff, its Board of Directors (BOD) constituted the Menteri Besar Selangor, the State Secretary and the State Financial Officer.

[6] The VSS payments was approved prior to his resignation as the Menteri Besar on 23 September 2014. Consequently, the VSS payments were paid and received by all the defendants.

[7] The plaintiff subsequently initiated these proceedings in the High Court against all the defendants to recover the VSS payments received by them, pleading that they were unlawful payments. The alleged unlawfulness was predicated on the fact that TSKI had approved the payment without the approval of the plaintiff's BOD. Instead, it was alleged that the first defendant and the second defendant had conspired to injure the plaintiff in making that unauthorised and unapproved payment to the other defendants. In conspiring to injure the plaintiff, the first defendant and second defendant were said to have breached their fiduciary duties to the plaintiff which resulted in an unjust enrichment to each of the defendants.

[8] The allegation of conspiracy against the first defendant and the second defendant was essentially grounded on the following narration: Before his resignation, on 25 August 2014 TSKI together with the other two members of the plaintiff's BOD held a meeting, where it was agreed in principle that the defendants be paid compensation in lieu of notice by way of VSS payments. That minutes of meeting is found in encl 23 (CB Vol 4) p 154. In that minutes it was further noted that the BOD had resolved for the management to revert on the same.

[9] Subsequent to that decision, about a month later, on 20 September 2014, the second defendant issued a memo to both the first defendant (CEO) and TSKI, proposing payment of three months' salary in lieu of notice plus

three options formula on the computation of the payable VSS.

[10] TSKI indicated his approval on that memo written by the second defendant. However, he did not make it clear which of the options was to be implemented. Another memo thus ensued. This time the CEO, the first defendant, wrote to TSKI to approve three months' salary in lieu of notice plus VSS payments at 30% of last drawn salary, multiplied by the number of months served. TSKI approved the proposal and directed its implementation, resulting in the VSS payments being paid out to all the defendants, respectively. TSKI did not deny in evidence that he did, in fact, approve the proposal for implementation on his own, without any approval of the BOD.

[11] This then led to the plaintiff's claim against the defendants being '... inter alia, grounded on the conspiracy between the first and second defendants to injure the plaintiff in making unauthorised and unapproved payment to the other defendants'. In conspiring, the defendants were alleged to have breached their fiduciary duties to the plaintiff.

[12] In response, the defendants contended that the plaintiff is a statutory corporation sole constituted in a single person pursuant to the MBI Enactment. That single person at the material time was the Menteri Besar of Selangor, TSKI. As a corporation sole, it was within the powers of TSKI as conferred by s 4 of the MBI Enactment, to approve the VSS payments without obtaining prior approval of the BOD. There is nothing in the MBI Enactment which fetters his powers endowed by s 4. A fortiori, the VSS payments was lawfully approved, hence no issue of unlawful payment can arise.

[13] After a full trial, the High Court found favour with the defendants' case and dismissed the plaintiff's claim. The learned trial judge agreed that the plaintiff is a corporation sole created by the MBI Enactment; it is not governed by a BOD because there is no provision in the MBI Enactment requiring so. In the absence of such requirement, it was held by the High Court that there was no obligation for TSKI to obtain any approval in the exercise of his powers pursuant to the MBI Enactment. Thus the approval by TSKI was not unlawful, which consequently disentitled the plaintiff to the claim made.

[14] On the conspiracy allegation, the High Court held that since the object of payment was lawful and it was not brought about by unlawful means, the allegation of conspiracy failed. In that, the High Court had difficulties construing a memo written by the first defendant to TSKI amounted to a conspiracy between the first defendant and the second defendant. Besides this memo, the High Court found no other evidence supporting the alleged conspiracy.

[15] The plaintiff had further attempted to argue that there was interference with the terms of the employment contract by TSKI in approving the VSS payments. The terms of employment, it was argued do not contain VSS. TSKI was said to have meddled with the terms of the employment contract between the plaintiff and the defendants, as the VSS payments were not payments in accord with the contractual terms. This contention was rejected by the High Court for want of pleadings.

[16] The Court of Appeal disagreed with the findings of the High Court. The Court of Appeal viewed the VSS payments unlawful in absence of approval by the plaintiff's BOD. The Court of Appeal took cognisance and agreed that the plaintiff is a corporation sole. The Court of Appeal also agreed that there is no express requirement in law for the plaintiff to have a BOD. However the Court of Appeal found that a BOD did exist in the plaintiff. Such existence was not denied by TSKI. The Court of Appeal took notice that past records showed that decisions of the plaintiff were always made upon approval of the BOD, except for the VSS payments. Finally it held and found that good governance, accountability and corporate governance dictated that TSKI must obtain the approval of BOD, the existence of which he had already acknowledged.

[17] Against that decision, four following questions of law were brought before us, which we will deal with, in turns.

Question 1: Whether Menteri Besar Selangor (Pemerbadanan) (MBI), the plaintiff, that was established by the Menteri Besar Selangor (Incorporation) Enactment 1994 is in law a corporation sole or corporate aggregate?

[18] The plaintiff in its submission did not dispute that it is a corporation sole created under the MBI Enactment. It is therefore not disputed that the plaintiff is a body corporate qua corporation sole. So too were the findings of both the courts below. In that light, question 1 posed is rather superfluous.

[19] In reliance of the authorities cited below, it is not difficult as it is clear to our mind that question 1 posed can simply be answered by saying that the Menteri Besar Selangor (Pemerbadanan) established by the MBI Enactment is in law a corporation sole and not a corporate aggregate.

[20] A proper examination of the legal status of the plaintiff, undisputably reveals that the plaintiff is a creation of a statute enacted by the State of Selangor, the MBI Enactment. Section 3 incorporates the person holding the office or performing the functions of Menteri Besar of Selangor as a body corporate under the name of 'Menteri Besar Selangor'. From this plainly worded provision of the law, we are clear in our mind that the incorporation of

the plaintiff fits the definition and the description of a corporation sole. This may be deduced from the authorities cited by the defendants, which we will now proceed to examine.

[21] First, there is *Halsbury's Laws* (5th Ed, 2010) Vol 24 on Corporation which explained corporation sole as '*a body politic having perpetual succession, constituted in a single person, who, in right of some office* or function, has a capacity to take, purchase, hold and demise (and in some particular instances, under qualifications and restrictions introduced by statute, power to alienate) real property, and now, it would seem, also to take and hold personal property, to him and his successors in such office for ever, the succession being perpetual'. (Emphasis added.)

[22] W Blackstone, *Commentaries on the Law of England in Four Books* (Vol 1 Philadelphia JB Lippincott Company 1893), at p 469 described corporation sole as a body 'consisting of only one person and his successors, in some particular situation are incorporated by law, in order to give them some legal capacities and advantages particularly that of perpetuity, which in their natural persons could not have had'.

[23] Echoing a similar stance, JW Salmond and PJ Fitzgerald in *Salmond on Jurisprudence* (12th Ed, Sweet & Maxwell 1966) shared the same view of a corporation sole, as an incorporated series of successive persons which only has one member at a time. An example cited was the Sovereign, who is said to be a corporation of this kind at common law. It was also observed by Salmon that the Postmaster-General, the Solicitor to the Treasury, the Secretary of State for War, the Minister of Town and Country Planning and the Minister of Education have been endowed by statute with the same nature. Salmond recognised though that the chief difficulty in apprehending the true nature of a corporation sole, was mainly because 'it bears the same name as the natural person who is its sole member for the time being, and who represents it and acts for it'.

[24] The above definitions and descriptions are to be contrasted and distinguished from a corporation aggregate. A corporation aggregate has been defined by *Halsbury* as a collection of individuals united into a body, with perpetual succession under an artificial form. In his explanation, Salmond emphasised that a corporation aggregate, usually is vested by the policy of the law with the capacity of acting as an individual, particularly in holding or granting property, in contracting obligations and of suing and being sued. Salmond too distinguished a corporation aggregate as an incorporated group of co-existing persons, and has several members at a time. An example referred is a registered company, which consists of the shareholders; a municipal corporation which constitutes the inhabitants of a borough. These

corporations are vested with capacities of acting in many aspects as an individual, such as holding or granting property, contracting power and may sue and be sued.

[25] Cases below cited by the counsel for the defendants in his written submissions will further illustrate the distinction between the two types of corporation. In an English case, *Daimler Company, Limited v Continental Tyre and Rubber Company (Great Britain) Limited* [1916] 2 AC 307 (HL) Lord Pannor made his observation as thus:

> ... Corporations sole are, in the main, ecclesiastical, but by the Public Trustee Act, 1906, the Public Trustee has been constituted a corporation sole, with perpetual succession and an official seal, and may sue or be sued under the above name like any other corporation sole. The object is to give the corporation a continued existence irrespective of the person holding the office of Public Trustee for the time being.

[26] The case of *Overseers of Poor v Sears* 39 Mass 122 cited Blackstone's in its judgment, reiterated the distinction between the two types of corporations, and expounded the difference as strikingly obvious. The obvious distinction being that corporation aggregate consist of many persons united into one society, but corporation sole consists of only one person.

[27] The United States case of *In re Roman Catholic Church of the Archdiocese of Santa Fe* 2020 Bankr LEXIS 3511, expressed itself on the notable difference in these terms:

> With a corporation sole, there is one 'officeholder,' who functions like the shareholder, director, and officer of the corporation. When he dies, retires, or otherwise leaves his duty station within the organization, his successor automatically becomes the replacement officeholder. Thus, '[a] corporation sole may pass from one person to the next without any interruption in its legal status'.

[28] In *Hubbard Association of Scientologists International v Attorney-General (Vic)* [1976] VR 119, the Supreme Court of Victoria, Australia made the distinction between the two types of corporation by referring to 'Grant on Corporations' (published in 1850) at p 626, where learned author observed:

> A corporation sole is a body politic, having perpetual succession, and being constituted in a single person, who, in right of some office, or function, has a capacity to take, purchase, hold, and demise (and in some particular instances, under qualifications and restrictions introduced by statute, power to alien) lands, tenements, and hereditaments, to him and his successors in such office for ever, the succession being perpetual, but not always uninterruptedly continuous; ... This description of corporation may be established either by prescription, or letters-patent, or, it is said, at common law, or by Act of parliament, or by customs; of all of which we shall notice instances in their proper places. Corporation's sole are

chiefly ecclesiastical, one or two instances only of lay corporations sole occurring in the books.

[29] In *Archbishop of Perth v 'AA' to 'JC' Inclusive; 'DJ' and Ors v Trustees of Christian Brothers and Ors* BC9501687, the Supreme Court of New South Wales Court of Appeal, emphasised the continuity of the existence of a corporation sole, being one of its main features.

[30] The High Court of Australia in *Crouch v Commissioner for Railways (Qld) and another* (1985) 62 ALR 1 made its observation on the subject that 'a corporation sole has two capacities, that of the natural person and that of the corporation'. Adding its observation further, it was stated that a particular incumbent of the office, for so long as he or she holds it, is clothed by the law with the personality, powers and functions of the corporate entity.

[31] The Supreme Court of India in *S Govinda Menon v The Union of India & Anor* 1967 AIR 1274; LNIND [1967] SC 33 similarly described the juristic distinction between a corporation sole and a corporation aggregate, and added to say, a corporation sole is not endowed with a separate legal personality as the corporation aggregate is (see also *The Board of Trustees, Ayurvedic Andunani Tibia College, Delhi vs The State of Delhi And Anor* 1962 AIR 458; LNIND [1961] SC 337).

[32] Nearer home, in *State of Johor and another v Tunku Alam Shah ibni Tunku Abdul Rahman and others* [2005] 4 SLR 380; [2005] SGHC 156, the High Court of Singapore found the bequest of Tyersall in that case as 'State property' did not offend rules against perpetuities because it is a bequest to a corporation sole. That finding was made by referring to the *Black's Law Dictionary* which defines corporation sole as a successive person holding an office as continued legal person.

[33] We now refer to *Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Ors* [1998] 5 MLJ 129 cited in support by the plaintiff. It involved a decision made by Menteri Besar of Johor who had approved in principle, inter alia, the conversion of some lands into a mixed development. That decision by Menteri Besar required the approval of the State Exco.

[34] The High Court held that Menteri Besar sitting alone was not an Exco decision under the State Constitution. It therefore would not bind the Exco. We agree that is the correct proposition of law relating to Menteri Besar's power under the State Constitution of Johore.

[35] We are here dealing with Menteri Besar (Pemerbadanan) which is a totally different body and which governed by different laws. Hence the case of

Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Ors is therefore wholly irrelevant to this appeal both on the facts and on the law.

[36] The Malaysian courts have been consistent in applying the distinction between a corporation sole and a body corporate. The Court of Appeal in *Badan Peguam Malaysia v Louis Edward Van Buerle* [2006] 1 MLJ 21 held and found the Malaysian Bar to be a corporate aggregate. In our view, the strikingly obvious distinction as stated earlier is that one cannot be a corporation sole on one hand but at the same time operate as if it were a corporation aggregate. With respect, the Court of Appeal had erred, when it accepted the plaintiff as a corporation sole but yet imposed the requirement of accountability as in a corporation aggregate.

[37] The next issue raised in both question 2 and question 3 will be taken together in this discussion. They are as posed below.

Question 2: If MBI is a corporation sole, whether the Menteri Besar at the material time is empowered to enter into contracts in the name and on behalf of MBI in his sole discretion?

Question 3: Whether MBI's 'Board of Directors' that is not established under the Menteri Besar Selangor (Incorporation) Enactment 1994 can fetter the powers of the Menteri Besar at the material time?

[38] Despite the position taken by the plaintiff, that is, it is indeed a corporation sole, it nevertheless contended that the approval of BOD is required since the BOD did in fact existed in the plaintiff. Moreover corporate governance and principle of accountability necessitate the approval of the BOD in any decision making by the plaintiff. TSKI according to the plaintiff had signed the approval of the VSS payments in the capacity as a Chairman of the BOD and not in the capacity of the plaintiff which is the Menteri Besar (Pemerbadanan).

[39] One thing is clear, this line of argument adopted by the plaintiff defies the definition and characteristic of a corporation sole. The common thread running through all the above definitions is clear, that a corporation sole is a body politic constituted one member. It can sue and be sued and exists in perpetuity, which currently takes the form of a statute creation, just like the plaintiff. The underlying objective is to create a perpetual existence of the incorporation, which a Menteri Besar, does not possess.

[40] To suggest that a corporation sole is legally bound to account to a BOD does no accord with the characteristic and definition. The plaintiff had not adduced any legal authority in support of its proposition, except to rely on

principle of accountability and good governance.

[41] The legal question as posed in question 2 in fact turns upon whether the incorporating law of the plaintiff imposes any duty on the plaintiff to be governed by any other body. A perusal of the MBI Enactment shows that it is a very short legislation. It incorporates the plaintiff under s 3, and confers the powers it has, pursuant to s 4. It says, the corporation may:

(a) enter into contracts;

(b) acquire, purchase, take, hold and enjoy movable and immovable property of every description;

(c) convey, assign, surrender and yield up, charge, mortgage, demise, reassign, transfer or otherwise dispose of, or deal with, any movable or immovable property vested in the Corporation upon such terms as the Corporation seems fit.

[42] Section 5 empowers the plaintiff to execute documents by the corporation, which shall be sealed in the presence of Menteri Besar, who shall sign, all documents, or other instruments to which the corporate seal is affixed. Besides the few provisions on incorporation and conferment of power, the MBI Enactment does not contain any provision on how this body is to be managed or operated. No mention of requirement of a BOD to be set up. The BOD that is undeniably exists therefore, may only be assumed as a body administratively created and not by requirement of any law. The BOD cannot therefore be said to be a legal body cloaked with legal identity or legal power.

[43] No doubt from the facts in this appeal, the BOD's approval may have formed part of the organisational practice of the plaintiff. The Court of Appeal had stated in its ground of judgment that 'the plaintiff always obtained the approval on all matters except the VSS payments'. With respect, this observation failed to consider the evidence of TSKI that he as a Menteri Besar (Pemerbadanan) often approved donations and grants to bodies such as the Football Association and under Geran Selangorku on his own. The findings of the Court of Appeal that approvals of BOD had always been the practice of the plaintiff except this VSS payments, is a finding not entirely substantiated by evidence. The Court of Appeal did not take into account the evidence of TSKI that he did not always obtain approval of BOD in the exercise of his function as the plaintiff.

[44] TSKI too had further clarified that, unlike a chairman of a company, he was not bound by the decision of the BOD which to him was merely advisory. The purpose of having a BOD he said, was only to keep the state government informed of any decision made by the plaintiff.

[45] It is patently clear from the MBI Enactment again, that there is no requirement therein or for that matter in any other law mandating the plaintiff to be governed by a BOD. Hence the failure to comply with, or obtain sanction of the BOD cannot be said to be a decision in breach of law or statute so as to render that decision unlawful. Since the plaintiff had run its case on the basis of unlawful payment, it is incumbent upon the plaintiff to establish that the approval of VSS payments offended some laws or statutes.

[46] The plaintiff if at all, may take TSKI to task for breaching the organisational practice. But the approval by TSKI without the sanction of administratively constituted BOD is not in breach of MBI Enactment and cannot amount to an unlawful decision and thereby resulting in the VSS payments unlawful. An act can only be declared unlawful if made in breach of law or a written statute. In this regard, the decision of the BOD directing the management to revert on the proposed VSS payments as appeared in the Minutes of meeting of the BOD, in our view is not binding on TSKI.

[47] The principle of legal interpretation is trite. It is not the function and duty of a court to read into the law, visibly missing provisions into the legislation. The Federal Court had in *Kuala Lumpur, Klang & Port Swettenham Omnibus Co Bhd v Transport Workers' Union* [1971] 1 MLJ 102, propounded this legal principle relating to power of a body established by law, when it stated in that case, 'The powers and duties of an authority or body established, appointed or constituted under a statute, on the other hand, are contained in the statute itself ...'. That is the correct proposition to speak of a statutory authority, as a body established under that statute.

[48] In *Putrajaya Holdings Sdn Bhd v Digital Green Sdn Bhd* [2008] 7 MLJ 757, this court at para 44 stated thus:

> In interpreting an Act of Parliament, the intention of the legislature must be taken into account. Once the intention is established and determined, then the court must give effect to that intention.

[49] A few other cases come to our mind, in support of this entrenched legal principle. In *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor* [2020] 2 MLJ 1, this court at para 138 observed thus:

> [138] I would thus read into s 68 of the Act a further exclusion to the jurisdiction of the Court of Appeal in the form of the definition of 'decision' in s 3 of the court. The terms 'judgment' or 'order' in s 3 of the Act should be transposed into s 68 of the Act in stating the matters that are not appealable to the Court of Appeal. *It is a settled rule of statutory interpretation that the court is permitted to read additional words into a statutory provision where clear reasons for doing so are to be found within the statute itself.* This established rule was stated in the oft-quoted House of Lords

decision of *Vickers, Sons and Maxim, Limited v Evans* [1910] AC 444. Lord Loreburn's statement of principle on the point reads as follows:

> The appellants' contention involves reading words into this clause. The clause does not contain them; and we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself ...

[50] The principle in *Vickers, Sons and Maxim, Limited v Evans* [1910] AC 444 has been cited repeatedly by this court in the course of interpreting statutory provisions (see *Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449 and *Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor* [2007] 6 MLJ 581).

[51] Very recently, this general rule of interpretation, was reiterated in the judgment of this court delivered by Vernon Ong FCJ in *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721. His Lordship observed:

> [30] In our opinion, the rules governing statutory interpretation may be summarised as follows. *First, in construing a statute effect must be given to the object and intent of the Legislature in enacting the statute. Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute* ... (Emphasis added.)

[52] The court shall at all times give effect to the intent and object of the Legislature in the exercise of interpreting a statute. Indisputably there is no provision establishing a BOD or conferring power to such board in the Enactment before us. It is not for the court to supplant what the law never have or never intend to legislate in the first place. The BOD in the plaintiff in our view, is merely an informal body without any statutory power or duties and is not cloaked with any legal authority. Thus, TSKI as Menteri Besar (Pemerbadanan) while exercising his powers under the MBI Enactment in approving the VSS payments, need not satisfy the requirement of consulting and obtaining approval from the BOD.

[53] If the intention of the Selangor State Legislature was to make it mandatory for the plaintiff to be governed by a BOD, it would not be difficult for such provision to be enacted clearly in the MBI Enactment, as is done in other incorporating statutes.

[54] All the State Legislatures in Malaysia having been conferred with the

legislative power by the Incorporation (State Legislatures Competency) Act 1962, had enacted the incorporation of Menteri Besar or Chief Ministers respectively and 'transform' him into a body corporate. Almost all the State enactments employed similar mode and had created this type of corporation with a similar undertone. Except for the state of Pahang, the person incorporated is the State Secretary and not the Menteri Besar.

[55] The Federal Parliament too had incorporated a corporation of similar nature by enacting the Minister of Finance (Incorporation) Act 1957. The Minister of Finance Incorporated is a creation of s 3 of the Minister of Finance (Incorporation) Act. Section 3 incorporates the person holding the post of Minister of Finance almost in similar way the plaintiff is incorporated. It says the Minister of Finance shall be the body corporate which has the ability of suing and being sued in its name, with perpetual succession and a corporate seal.

[56] Although the enactments of various states contain similar provisions on powers or additional powers of the corporation, most of them are silent on establishing a Board of Directors or committee to govern this body, with the exceptions of the two states of Melaka and Kelantan. Only in both these two states their incorporation laws provide for the creation of committees, while the other states are in the like nature of the MBI Enactment before us.

[57] By comparison, unlike the MBI Enactment, the Chief Minister Malacca (Incorporation) Enactment 1993 and the Kelantan Menteri Besar Incorporation Enactment 1950 provide for creation of committees. In the case of the Malacca Enactment it is provided in s 9 that:

> 9(1) The Corporation may appoint committees for any purpose arising out of or connected with any of its functions and powers.
>
> (2) The committee so appointed shall regulate its own procedure.
>
> (3) Any committee so appointed shall conform to any instruction from time to time given to it by the Corporation and the Corporation may at any time discontinue the committee so appointed.
>
> (4) The committee shall report its recommendation to the Corporation.

[58] The Kelantan Menteri Besar Enactment 1950 contains similar provisions as above. No doubt, looking at the above wordings of the law, it remains arguable if indeed, the intention is to make the incorporation accountable or subjected to such committee, obligatory. The MBI Enactment however was not enacted with these similar provisions.

[59] If the MBI Enactment had the intent to establish a BOD or an advisory

committee for the plaintiff, it would have been expressly legislated in the Enactment. The absence of such provisions suggests that the State Legislature has no intention to establish such Board or committee. The court may not suggest otherwise as it is the duty of the Legislature to make law and the Judiciary to interpret the law. The court shall not encroach into the power of the Legislature in the spirit of the doctrine of the separation of power.

[60] The legal position of a corporation sole differs from a corporation aggregate such as a company under the Companies Act 2016. Section 211 of the Companies Act 2016 makes it mandatory that 'The business and affairs of a company shall be managed by, or under the direction of the Board'. Whereas the MBI Enactment is the plaintiff's charter, which defines its powers and duties and any limitation of the powers conferred can only be discerned from the incorporating statutes.

[61] Since the law incorporating the plaintiff does not contemplate a BOD, the court cannot treat the administratively created BOD as having legal power. Without any vesting of power by the MBI Enactment to the BOD, the court cannot give effect otherwise. TSKI therefore was under no obligation to obtain approval in the exercise of powers conferred by the MBI Enactment. It follows that the act of TSKI in approving the VSS payments with no sanction of the BOD is not unlawful. This proposition is inconsonant with the principle that a corporation sole is an incorporation of a single person, and he is one and the same as proffered in *S Govinda Menon*.

[62] In arriving at this conclusion, we are not for a moment rejecting the principle of accountability as applied by the Court of Appeal. It is no doubt a profound principle to uphold in the exercise of powers of an authority. However, we are here to determine the issue of unlawfulness, tasked with a duty to interpret the MBI Enactment, relying on settled principle we have alluded to earlier. The State Legislature in its wisdom did not see the need to make the plaintiff accountable in law. That said, the State Legislature or the State Government of Selangor may have some other ways of making the plaintiff accountable in its action to the state government.

[63] In answering question 2 therefore, we are of the view that at the material time, TSKI was legally empowered to approve the VSS payments under the MBI Enactment on his own, without the need for approval of the BOD. Hence that question must be answered in the affirmative.

[64] It follows that question 3 should be answered in the negative. There is no fetter imposed by law on the plaintiff pursuant to the MBI Enactment. Thus, notwithstanding the creation of the BOD purportedly supervising the plaintiff, it cannot change the plaintiff's legal status.

[65] We now come to the next question, which is question 4.

Question 4: Whether employees of MBI acting under the instructions of Menteri Besar at the material time can be held liable for breach of trust and/or breach of fiduciary duty to MBI's board of directors?

[66] The facts revealed that the first and second defendants were acting under the direction of TSKI as Menteri Besar. They were not the ones who orchestrated the payment. The third to eighth defendants were merely recipients of the VSS payments on the termination and cessation of their employment with the plaintiff. Not a scintilla of evidence was produced to suggest that these other defendants played any role in the process to have the VSS payments approved. The role played by the first and second defendants cannot by any stretch of imagination be in support of the conspiracy alleged against them. We are in complete agreement with the High Court in its finding that it would be difficult to construe the writing of the memos to TSKI as acts of conspiracy. There was nothing else shown to link the other defendants to the alleged conspiracy. The plaintiff had incontrovertibly failed to establish how these defendants had breached the trust or fiduciary duties to the plaintiff.

[67] Ironically, TSKI had not been cited as a defendant in the claim of the plaintiff though in the ultimate, his approval of the VSS payments was effectively impugned. The loss suffered by the plaintiff was a result of the alleged wrongful act of TSKI. For the defendants the payment was received purely as VSS payments on the premature termination of their employment with the plaintiff. Far from being unlawful, there cannot be any sinister aspersions casted on receiving VSS payments on termination. Indeed it is a common practice in the law of employment.

[68] To sum up, we agree with the defendants that the plaintiff is a corporate sole incorporated as Menteri Besar (Pemerbadanan). The Menteri Besar then TSKI's powers pursuant to the MBI Enactment is not fettered and not subjected to the BOD. The plaintiff had failed to establish the alleged conspiracy against the defendants. In the result, the plaintiff had failed to mount a case that the VSS payments are unlawful.

[69] For all the reasons stated, the appeal by the defendants is unanimously allowed with costs. The order of the Court of Appeal is set aside and the order of the High Court is hereby reinstated.

A *Appeal allowed; COA's decision set aside and the decision of the High Court reinstated.*

Reported by Ashok Kumar

B

C

D

E

F

G

H

I